

NOTICE OF INTENT

Department of Health and Hospitals Bureau of Health Services Financing

Direct Service Worker Registry (LAC 48:I.Chapter 92)

The Department of Health and Hospitals, Office of the Secretary, Bureau of Health Services Financing proposes to amend LAC 48:I.Chapter 92 as authorized by R.S. 37:1031-1034 and R.S. 40:2179-2179.1. This proposed Rule is promulgated in accordance with the provisions of the Administrative Procedure Act, R.S. 49:950 et seq.

In compliance with Act 451 of the 2005 Regular Session of the Louisiana Legislature and Act 29 of the 2011 Regular Session of the Louisiana Legislature, the Department of Health and Hospitals, Bureau of Health Services Financing adopted provisions governing medication administration and the performance of noncomplex nursing tasks by direct service workers (*Louisiana Register*, Volume 38, Number 12).

The department has now determined that it is necessary to amend the provisions governing the DSW Registry in order to align the DSW Registry Rule with R.S. 40:2179-40:2179.1, and to provide information on how to access the DSW Registry online database for verification purposes.

Title 48

PUBLIC HEALTH-GENERAL Part I. General Administration

Subpart 3. Health Standards

Chapter 92. Direct Service Worker Registry

Subchapter A. General Provisions

§9201. Definitions

Activities of Daily Living (ADLs)—the functions or tasks which are performed either independently or with supervision that assist an individual to live in a community setting, or that provide assistance for mobility (i.e., bathing, dressing, eating, grooming, walking, transferring and toileting).

DAL—Division of Administrative Law or its successor.

Department—the Louisiana Department of Health and Hospitals (DHH).

Direct Service Worker (DSW)—an unlicensed person who provides personal care or other services and support~~s~~ to persons with disabilities or to the elderly to enhance their well-being, and who is involved in face-to-face direct contact with the person~~—and is compensated through state or federal funds.~~

Functions performed may include, but are not limited to, assistance and training in activities of daily living, personal care services, and job-related supports. Examples of direct service workers employed in a licensed health care setting include, but are not limited to:

1. patient care technicians;
 2. hospital aides;
 3. unlicensed assistive personnel (UAPs);
 4. home health aides;
 5. hospice aides;
 6. direct care workers;
 7. mental health technicians;
 8. mental health aides;
 9. mental health orderlies;
 10. nursing aides or hospital orderlies;
 11. nursing assistants;
 12. patient care aides; and/or
 13. any persons hired as unlicensed direct care staff
- that meet the provisions of this chapter.

Note: Those persons who are listed on the Certified Nurse Aide Registry and who are employed as certified nurse aides in a licensed nursing facility and/or a skilled nursing facility within a hospital are not included under these provisions as a direct service worker.

Disability—a physical or mental impairment which substantially limits one or more of the major life activities of an individual or who has a history of such impairment or who is regarded as having such impairment; having a condition (such as an illness or an injury) that damages or limits a person's

physical or mental abilities, either temporarily or on a permanent basis.

Elderly—persons who are elderly are considered being past middle age and approaching old age, of, or relating to, or having characteristics of older persons, or life in later years; sometimes used to describe any adult over 75 years old or individuals over 65 years old who have functional impairments.

Exploitation—the illegal or improper use or management of ~~an aged person's or disabled adult's~~ the funds, assets or property of an adult with disabilities or who is elderly, or the use of ~~an aged person's or disabled adult's~~ the power-of-attorney or guardianship of an adult with disabilities or who is elderly for one's own profit or advantage.

Finding—allegations of abuse, neglect, exploitation or extortion that are placed on the registry by the department for the following reasons: ~~following a decision by an administrative law judge or a court of law after all appeal delays afforded by law or allegations of abuse, neglect, exploitation or extortion that are place on the registry by the department as a result of failure to timely request an appeal in accordance with the provisions of this Rule.~~

1. after a final decision by an administrative law judge or a court of law, after all appeal delays afforded by law are exhausted; or

2. failure by the accused to timely request an appeal in accordance with the provisions of this Rule.

Health Care Provider-any health care facility, agency, or entity licensed or certified by DHH. Such entities may be referred to in other laws, statutes and regulations as providers, agencies, clinics, residential care units, homes or facilities. Health care providers include, but are not limited to, the following:

1. nursing facilities;

2. hospice providers;

3. hospitals;

4. intermediate care facilities;

5. adult residential care providers;

6. adult day health care centers;

7. home health agencies;

8. behavioral health providers;

9. dialysis units; or

10. home and community based services providers.

Health Standards Section (HSS)-the section of the Department of Health and Hospitals responsible for the licensing and

certification of health care providers, ~~Bureau of Health Services Financing's Health Standards Section.~~

Independent Living Environment—~~a person's residence which may include the person's home, apartment, trailer or other unlicensed residence and includes where the person works, attends school or engages in community activities.~~ Repealed.

Major life activities—functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

Person-Specific Training—a set of knowledge, skills, training and abilities that ~~pay close attention to~~ address the ~~person's~~ client's strengths, ~~age~~ restrictions relative to aging, disabilities, health care needs and related factors in order to meet the unique needs of the person receiving care.

Plan of Care—a plan that describes the assistance or services required to be provided to a person receiving home and community-based services, as defined herein. The plan also describes who shall provide the assistance and the frequency and/or duration of the services that ~~will~~ shall be provided.

AUTHORITY NOTE: Promulgated in accordance with R.S. 40:2179-2179.1.

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Office of the Secretary, Bureau of Health Services Financing, LR 32:2058 (November 2006), amended LR 33:95 (January 2007), amended by the Department of Health and Hospitals, Bureau of Health Services Financing, LR 38:3175 (December 2012), LR 42:

§9202. Introduction

A. The Department of Health and Hospitals (DHH) shall maintain a registry of individuals for whom specific findings of abuse, neglect, exploitation or extortion have been substantiated by the department, and administrative law judge, or a court of law.

B. - B.6. ...

C. ~~Employers~~ Licensed health care providers must use shall access the registry to determine if there is a finding that a prospective hire or currently employed direct service worker has been determined to have committed abused or neglected of an individual being supported, or misappropriated the individual's property or funds. If there is such a finding on the registry, the prospective employee shall not be hired nor shall a current employee have continued employment with the licensed health care provider.

D. All provisions of this Chapter, except Subchapter D, §9241-§9261, Medication Administration and Noncomplex Tasks in

Home and Community-Based Settings, applies to any licensed health care provider who employs direct service workers who provide personal care or other services and support to persons with disabilities or to the elderly to enhance their well-being, and who is involved in face-to-face direct contact with the person.

1. Exception. Home and community-based services providers are required to meet all provisions of this Chapter, inclusive of Subchapter D, §9241-§9261, if the HCBS provider employs direct service workers who perform medication administration and noncomplex medical tasks in the HCBS setting.

E. The provisions of this Chapter shall apply to direct service workers who are compensated, regardless of the setting, and specifically do not apply to those direct service workers listed on the Certified Nurse Aide Registry established under rules promulgated by the Department of Health and Hospitals.

AUTHORITY NOTE: Promulgated in accordance with R.S. 40:2179-2179.1.

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Office of the Secretary, Bureau of Health Services Financing, LR 32:2059 (November 2006), amended LR 33:95 (January 2007), amended by the Department of Health and Hospitals, Bureau of Health Services Financing, LR 38:3176 (December 2012), LR 42:

Subchapter C. Provider Participation

§9231. Health Care Provider Responsibilities

A. Prior to hiring any direct service worker or trainee,
~~a~~ the licensed health care provider shall:

1. assure that the individual is at least 18 years of age, and that they have the ability to read, write and ~~carry out directions competently as assigned~~ comprehend the English language; and

2. access the registry ~~to determine if there is a finding that he/she has abused or neglected an individual being supported or misappropriated the individual's property or funds. If there is such a finding on the registry, the prospective employee shall not be hired~~ in accordance with the provisions of §9202.C.

B. The health care provider shall have a written process to check the registry every six months to determine if any currently employed direct service worker or trainee has been placed on the registry with a finding that he/she has been determined to have committed ~~abused~~ or neglected ~~ed~~ of an individual being supported or misappropriated the individual's property or funds.

1. The provider shall ~~maintain printed confirmation from the registry web site as verification~~ follow the agency's process in demonstration of compliance with this procedure.

2. If there is such a finding on the registry, the employee shall not have continued employment with the licensed health care provider in accordance with the provisions of §9202.C.

AUTHORITY NOTE: Promulgated in accordance with R.S. 40:2179-2179.1.

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Office of the Secretary, Bureau of Health Services Financing, LR 32:2061 (November 2006), amended LR 33:97 (January 2007), amended by the Department of Health and Hospitals, Bureau of Health Services Financing, LR 38:3176 (December 2012), LR 42:

Subchapter D. Medication Administration and Noncomplex Tasks in Home and Community-Based Settings

§9243. General Requirements for the Performance of Medication Administration and Noncomplex Tasks in Home and Community-Based Settings

A. - B. ...

AUTHORITY NOTE: Promulgated in accordance with R.S. 37:1031-1034.

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Bureau of Health Services Financing, LR 38:3177 (December 2012), amended LR 42:

§9245. Training Requirements for the Performance of Medication Administration and Noncomplex Tasks in Home and Community-Based Settings

A. - D. ...

AUTHORITY NOTE: Promulgated in accordance with R.S. 37:1031-1034.

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Bureau of Health Services Financing, LR 38:3177 (December 2012), amended LR 42:

§9249. Authorized Medication Administration and Noncomplex Tasks in Home and Community-Based Settings

A. - A.3. ...

AUTHORITY NOTE: Promulgated in accordance with R.S. 37:1031-1034.

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Bureau of Health Services Financing, LR 38:3178 (December 2012), amended LR 42:

§9257. Liability

A. - B. ...

C. ~~Notwithstanding~~ Notwithstanding any other provision of law, licensed agencies that employ direct service workers shall be liable for acts or omissions of the direct service worker.

AUTHORITY NOTE: Promulgated in accordance with R.S.
37:1031-1034.

HISTORICAL NOTE: Promulgated by the Department of Health
and Hospitals, Bureau of Health Services Financing, LR 38:3179
(December 2012), amended LR 42:

§9261. Violations and Noncompliance

A. ...

B. ~~If a direct service worker is found to be administering medication or performing noncomplex tasks in a manner not consistent with these provisions or other state regulations, the HSS shall require that the direct service worker immediately cease performing such~~ In accordance with §9259.A(2), authorization for a direct service worker to perform any of the tasks specified in R.S. 37:1032 shall be terminated if the registered nurse certifies that the direct service worker can no longer perform the prescribed tasks safely and the direct service worker shall immediately cease performing such procedures.

C. ~~If the professional performance of a registered nurse or a licensed practical nurse is found to be questionable by the Health Standards Section, a referral shall be made to the respective professional licensing board for review and consideration.~~ Repealed.

AUTHORITY NOTE: Promulgated in accordance with R.S.
37:1031-1034.

HISTORICAL NOTE: Promulgated by the Department of Health
and Hospitals, Bureau of Health Services Financing, LR 38:3180
(December 2012), amended LR 42:

Subchapter E. Violations

§9273. Allegations of Direct Service Worker Wrong-Doing

A. The department, through the Division of Administrative
Law, or its successor, ~~has provided for~~ provides a process ~~of~~
for the review, ~~and~~ investigation, and appeal of all allegations
of wrong-doing by direct service workers. Direct service workers
and trainees ~~must~~ shall not:

1. - 2. ...

AUTHORITY NOTE: Promulgated in accordance with R.S.
40:2179-2179.1.

HISTORICAL NOTE: Promulgated by the Department of Health
and Hospitals, Office of the Secretary, Bureau of Health
Services Financing, LR 32:2061 (November 2006), amended LR 33:98
(January 2007), amended by the Department of Health and
Hospitals, Bureau of Health Services Financing, LR 38:3180
(December 2012), LR 42:

§9275. Notice of Violation

A. When there are substantiated ~~charges~~ allegations
against the direct service worker, either through oral or

written evidence, the department will notify the individual(s) implicated in the investigation of the following ~~information by certified mail~~:

1. - 2. ...

3. the right to request from HSS an informal discussion (informal dispute resolution process) ~~and the right to an administrative hearing.~~; and

4. the right to request from the Division of Administrative Law an administrative hearing (appeal).

AUTHORITY NOTE: Promulgated in accordance with R.S. 40:2179-2179.1.

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Office of the Secretary, Bureau of Health Services Financing, LR 32:2061 (November 2006), amended LR 33:98 (January 2007), LR 42:

§9277. Informal Dispute Resolution

A. When a direct service worker feels that he/she has been wrongly accused, the following procedure ~~should~~ shall be followed:

1. The direct service worker may request an informal dispute resolution (IDR) within 15 calendar days of the receipt of the department's notice of violation. The request for an IDR ~~must~~ shall be made to the ~~department~~ HSS in writing.

2. The IDR is designed:

a. to provide an opportunity for the direct service worker to informally ~~review~~ discuss the ~~situation~~ allegations that make the basis for placement of the finding;

b. - c. ...

3. An IDR ~~meeting~~ session will be arranged within 20 days of receipt of the written request.

4. During the IDR, the direct service worker will be afforded the opportunity to:

a. talk with agency personnel ~~involved in~~ assigned to the ~~situation~~ IDR;

b. - e. ...

5. Notice of the results of the IDR decision will be forwarded to the DSW in writing. Such written notice will include any further opportunities for appeal, if necessary and/or appropriate.

AUTHORITY NOTE: Promulgated in accordance with R.S. 40:2179-2179.1.

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Office of the Secretary, Bureau of Health Services Financing, LR 32:2061 (November 2006), amended LR 33:98 (January 2007), amended by the Department of Health and Hospitals, Bureau of Health Services Financing, LR 38:3180 (December 2012), LR 42:

Subchapter F. Administrative Hearings

§9285. General Provisions

A. ...

1. The request for an administrative hearing ~~must~~ shall be made in writing to the Division of Administrative Law, or its successor.

2. The request ~~must~~ shall contain a statement setting forth the specific ~~charges~~ allegations ~~with~~ which the direct service worker ~~disagrees~~ disputes and the reasons for this ~~disagreement~~ dispute.

A.3. - B. ...

~~1. The notice shall be mailed no later than 15 calendar days before the scheduled date of the administrative hearing and shall contain the:~~

~~_____ a. date of the hearing;~~

~~_____ b. time of the hearing; and~~

~~_____ c. place of the hearing~~ B.1. - B.1.c. Repealed.

C. The administrative hearing shall be conducted by an administrative law judge from the Division of Administrative Law, or its successor, as authorized by R.S. 46:107 and according to the ~~following procedures~~ Administrative Procedure Act.

~~1. An audio recording of the hearing shall be made.~~

~~2. A transcript will be prepared and reproduced at the request of a party to the hearing, provided he bears the cost of the copy of the transcript.~~

~~3. Testimony at the hearing shall be taken only under oath, affirmation or penalty of perjury.~~

~~4. Each party shall have the right to:~~

~~a. call and examine parties and witnesses;~~

~~b. introduce exhibits;~~

~~c. question opposing witnesses and parties on any matter relevant to the issue, even though the matter was not covered in the direct examination;~~

~~d. impeach any witness, regardless of which party first called him to testify; and~~

~~e. rebut the evidence against him/her.~~

~~5. Any relevant evidence shall be admitted if it is the sort of evidence upon which responsible persons are accustomed to rely on in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make the admission of such evidence improper over objection in civil or criminal actions.~~

~~a. Documentary evidence may be received in the form of copies or excerpts.~~

~~6. The administrative law judge may question any party or witness and may admit any relevant and material evidence.~~

~~7. A party has the burden of proving whatever facts he/she must establish to sustain his/her position.~~

~~8. The burden of producing evidence to substantiate the written allegation(s) will be on the department and the provider of services, if appropriate.~~

~~9. When the allegation(s) supporting placement of a finding is substantiated, the direct service worker may not rest on the mere denial in his/her testimony and/or pleading(s) but must set forth specific facts and produce evidence to disprove or contest the allegation(s).~~1. - 9. Repealed.

D. ~~Any party may appear, and be heard, at any appeals proceeding through an attorney or a designated representative. The representative shall have a written authorization to appear on behalf of the provider.~~If there is a final and binding administrative hearing decision to place a finding on the DSW Registry against the direct service worker, the department shall place the direct service worker's name and the adverse findings on the DSW Registry. The occurrence and findings will remain on the DSW Registry permanently.

~~1. A person appearing in a representative capacity shall file a written notice of appearance on behalf of a provider identifying:~~

- ~~a. his/her name;~~
- ~~b. address;~~
- ~~c. telephone number; and~~
- ~~d. the party being represented.~~

~~E. At the conclusion of the administrative hearing, the administrative law judge shall:~~

- ~~1. take the matter under advisement; and~~
- ~~2. prepare a written proposed decision which will contain:~~

- ~~a. findings of fact;~~
- ~~b. a determination of the issues presented;~~
- ~~c. a citation of applicable policy and regulations; and~~
- ~~d. an order.~~

~~F. The written proposed decision is provided to the secretary of the department. The secretary may:~~

- ~~1. adopt the proposed decision;~~
- ~~2. reject it based upon the record; or~~
- ~~3. remand the proposed decision to the administrative law judge to take additional evidence.~~

~~a. If the proposed decision is remanded, the administrative law judge shall submit a new proposed decision to the secretary.~~

~~C. The decision of the secretary shall be final and binding upon adoption, subject only to judicial review by the courts. A copy of the decision shall be mailed to the direct service worker at his last known address and to any representative thereof.~~

~~H. If there is a final and binding administrative hearing decision to place a finding on the DSW Registry against the direct service worker, the department shall place the direct service worker's name and the adverse findings on the DSW Registry. The occurrence and findings will remain on the DSW Registry permanently.~~ D.1. - H. Repealed.

AUTHORITY NOTE: Promulgated in accordance with R.S. 40:2179-2179.1.

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Office of the Secretary, Bureau of Health Services Financing, LR 32:2062 (November 2006), amended LR 33:98 (January 2007), amended by the Department of Health and Hospitals, Bureau of Health Services Financing, LR 38:3180 (December 2012), LR 42:

§9287. Preliminary Conferences

~~A. Although not specifically required, the Bureau of Appeals may schedule a preliminary conference. The purposes of the preliminary conference include, but are not limited to:~~

~~1. clarification, formulations and simplification of issues;~~

~~2. resolution of controversial matters;~~

~~3. exchange of documents and information;~~

~~4. stipulations of fact to avoid unnecessary introduction of evidence at the formal review;~~

~~5. the identification of witnesses; and~~

~~6. other matters which may aid disposition of the issues.~~

~~B. When the Division of Administrative Law, or its successor, schedules a preliminary conference, all parties shall be notified in writing. The notice shall direct any parties and their attorneys to appear on a specific date and at a specific time and place.~~

~~C. When the preliminary conference resolves all or some of the matters in controversy, a summary of the findings agreed to at the conference shall be provided by the administrative law judge. When the preliminary conference does not resolve all of the matters in controversy, an administrative hearing shall be scheduled on those matters still in controversy.~~

~~1. The hearing shall be scheduled within 30 calendar days following the completion of the preliminary conference or at a time mutually convenient to all parties.~~Repealed.

AUTHORITY NOTE: Promulgated in accordance with R.S. 40:2179-2179.1.

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Office of the Secretary, Bureau of Health Services Financing, LR 32:2062 (November 2006), amended LR 33:99 (January 2007), amended by the Department of Health and Hospitals, Bureau of Health Services Financing, LR 38:3180 (December 2012), repealed LR 42:

§9293. Failure to Appear at Administrative Hearings

~~A. If a direct service worker fails to appear at an administrative hearing, a notice/letter of abandonment may be issued by the Division of Administrative Law, or its successor, dismissing the appeal. A copy of the notice shall be mailed to each party.~~

~~B. Any dismissal may be rescinded upon order of the Bureau of Appeals if the direct service worker:~~

~~1. makes written application within 10 calendar days after the mailing of the dismissal notice; and~~

~~2. provides evidence of good cause for his/her failure to appear at the hearing.~~Repealed.

AUTHORITY NOTE: Promulgated in accordance with R.S. 40:2179-2179.1.

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Office of the Secretary, Bureau of Health Services Financing, LR 32:2063 (November 2006), amended LR 33:100 (January 2007), amended by the Department of Health and Hospitals, Bureau of Health Services Financing, LR 38:3181 (December 2012), repealed LR:42

In compliance with Act 1183 of the 1999 Regular Session of the Louisiana Legislature, the impact of this proposed Rule on the family has been considered. It is anticipated that this proposed Rule will have no impact on family functioning, stability and autonomy as described in R.S. 49:972.

In compliance with Act 854 of the 2012 Regular Session of the Louisiana Legislature, the poverty impact of this proposed Rule has been considered. It is anticipated that this proposed Rule will have no impact on child, individual, or family poverty in relation to individual or community asset development as described in R.S. 49:973.

In compliance with House Concurrent Resolution (HCR) 170 of the 2014 Regular Session of the Louisiana Legislature, the provider impact of this proposed Rule has been considered. It is anticipated that this proposed Rule will have no impact on the staffing level requirements or qualifications required to

provide the same level of service, no direct or indirect cost to the provider to provide the same level of service, and will have no impact on the provider's ability to provide the same level of service as described in HCR 170.

Interested persons may submit written comments to Cecile Castello, Health Standards Section, P.O. Box 3767, Baton Rouge, LA 70821 or by email to MedicaidPolicy@la.gov. Ms. Castello is responsible for responding to inquiries regarding this proposed Rule. A public hearing on this proposed Rule is scheduled for Thursday, January 28, 2016 at 9:30 a.m. in Room 118, Bienville Building, 628 North Fourth Street, Baton Rouge, LA. At that time all interested persons will be afforded an opportunity to submit data, views or arguments either orally or in writing. The deadline for receipt of all written comments is 4:30 p.m. on the next business day following the public hearing.

Kathy H. Kliebert

Secretary